



DEPARTMENT OF DEFENSE

8320-01

DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 17

RIN 2900-AN92

Vet Center Services

AGENCIES: Department of Defense and Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to establish in regulation the readjustment counseling currently provided in VA's Vet Centers to certain veterans of the Armed Forces and members of their immediate families, and to implement provisions of the Caregivers and Veterans Omnibus Health Services Act of 2010 (the 2010 Act) regarding readjustment counseling. Although for several decades VA has provided readjustment counseling to veterans and members of their immediate families, a regulation is now explicitly required by the 2010 Act. The 2010 Act makes certain current members of the Armed Forces who served on active duty in Operation Enduring Freedom or Operation Iraqi Freedom eligible for the readjustment counseling that VA currently provides to veterans and members of their immediate families. In addition, the proposed regulation would authorize Vet Centers to provide referral and advice to individuals who are not otherwise eligible for such counseling, and served in a theater of combat operations or in an area during a period of hostilities in that area, in accordance with the 2010 Act.

DATES: Comments must be received by VA on or before [insert date 60 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Written comments may be submitted through <http://www.Regulations.gov>; by mail or hand delivery to the Director, Regulations Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to “RIN 2900-AN92, Vet Center Services.” Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461–4902 (this is not a toll-free number) for an appointment. In addition, during the comment period, comments may be viewed online through the Federal Docket Management System at <http://www.Regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Gregory Harms, Readjustment Counseling Service (15), Veterans Health Administration, Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420; (202) 461-6525. (This is not a toll-free number).

SUPPLEMENTARY INFORMATION: Under 38 U.S.C. 1712A, VA is authorized to establish Vet Centers that must furnish counseling to certain veterans upon request, who are clearly identified by the statute, to assist such veterans in readjusting to civilian

life. We have consistently interpreted this authority to provide readjustment counseling broadly to mean those types of counseling that would assist in readjusting to life as part of a family, reentering civilian employment, and referrals for medical care or substance abuse. For decades, VA has implemented this authority without regulation based on statutory authority. On May 5, 2010, Congress provided in section 401 of the 2010 Act that “[a]ny member of the Armed Forces, including a member of the National Guard or Reserve, who serves on active duty in the Armed Forces in Operation Enduring Freedom or Operation Iraqi Freedom is eligible” for the services provided to veterans under 38 U.S.C. 1712A, “regardless of whether or not the member is currently on active duty in the Armed Forces at the time of receipt of counseling and services under” section 1712A. Pub. L. 111-163, sec. 401(a) and (b). The law also provides that eligibility for these members of the Armed Forces “shall be subject to such regulations as the Secretary of Defense and the Secretary of Veterans Affairs shall jointly prescribe for purposes of [section 401].” This proposed rule would initiate the rulemaking requirement prescribed by Congress. Although VA has provided section 1712A benefits without a regulation in the past, in the interests of clarity and completeness the proposed regulation would cover the provision of benefits to veterans under section 1712A as well as benefits provided under section 401 of the 2010 Act.

In addition, section 402 of the 2010 Act added a new 38 U.S.C. 1712A(c), which requires VA to provide certain referral services and advice to an “individual who has been discharged or released from active military, naval, or air service but who is not otherwise eligible” for readjustment counseling. The proposed rule would implement this statutory authority.

Lastly, section 304 of the 2010 Act authorizes readjustment counseling for the immediate family of Operation Enduring Freedom and Operation Iraqi Freedom veterans for a period of 3 years after such veterans return from deployment. This counseling is available to help the readjustment of such veterans to civilian life or to assist the readjustment of the family following the return of such veterans.

Proposed paragraph (a) would concern eligibility for readjustment counseling. Pursuant to the requirements of 38 U.S.C. 1712A(a)(1)(A) and in accordance with current practice, VA provides benefits “[u]pon the request” of an eligible veteran. There are no forms or claims required to obtain this benefit—individuals need only make an oral request for readjustment counseling upon presenting at the Vet Center.

Subsections (a)(1) and (2) of 38 U.S.C. 1712A set forth the categories of veterans who are eligible for benefits under the statute. We would greatly simplify the language describing them. First, 38 U.S.C. 1712A(a)(1)(B)(i)(I) requires VA to provide readjustment counseling to any “veteran who served on active duty . . . in a theater of combat operations (as determined by the Secretary [of VA] in consultation with the Secretary of Defense) during the Vietnam era.” Second, 38 U.S.C. 1712A(a)(1)(B)(i)(II) requires VA to provide readjustment counseling to veterans who served “after May 7, 1975,” which is the ending date of the Vietnam era (see 38 U.S.C. 101(29)), “in an area at a time during which hostilities occurred in that area.” Third, 38 U.S.C. 1712A(a)(2)(A) provides that VA “may furnish” benefits to veterans other than those discussed above—for whom VA “shall furnish” benefits—who “served in the active military, naval, or air service in a theater of combat operations . . . during a period of war, or in any other area during a period in which hostilities . . . occurred in such area.” We note that VA has

consistently provided benefits to such veterans in accordance with the Secretary's discretion under this provision.

The statute then defines "hostilities" solely for the purpose of veterans whose eligibility is established under section 1712A(a)(2)(A), as "an armed conflict in which the members of the Armed Forces [we]re subjected to danger comparable to the danger to which members of the Armed Forces have been subjected in combat with enemy armed forces during a period of war, as determined by the Secretary [of VA] in consultation with the Secretary of Defense." 38 U.S.C. 1712A(a)(2)(B). This definition is a general, basic, and commonly understood meaning of the term "hostilities." We do not know, and the legislative history is silent as to, why Congress chose to make this definition explicitly applicable to the use of the term "hostilities" in section 1712A(a)(2)(A), but did not address the meaning of the same term as it is used in section 1712A(a)(1)(B)(i)(II). In repeated consultations with DoD over the decades during which we have been providing benefits under this section, VA has been unable to identify a reason that the definition of "hostilities" in section 1712A(a)(2)(A) should be different from the definition in the earlier section. Again, the definition provided in 38 U.S.C. 1712A(a)(2)(B) is clear and encompasses the only meaning that we believe could have been intended by the use of the word "hostilities." Hence, we have not in practice distinguished between the "hostilities" requirements in 1712A(a)(1) and (a)(2), and do not intend to do so in the proposed rule.

Because we do not distinguish between the "hostilities" described in sections 1712A(a)(1) and (a)(2), and because we will continue to provide readjustment counseling in accordance with the broader, discretionary authority in section

1712(a)(2)(A), the above-described eligibility criteria for readjustment counseling under section 1712A can be simplified to read as follows:

- (1) A veteran who served on active duty in a theater of combat operations during a period of war.
- (2) A veteran who served on active duty in an area in which hostilities occurred, or in combat against a hostile force during a period of hostilities.

In addition to the above-described veterans, we propose to include three additional categories of individuals who would be authorized to receive benefits under the proposed rule. Proposed paragraph (a)(3) would establish eligibility for any “veteran who served on active duty during the Vietnam era who sought or was provided counseling under 38 U.S.C. 1712A before January 1, 2004.” This would be a straightforward application of 38 U.S.C. 1712A(a)(1)(B)(ii), which extends eligibility to veterans who served during the Vietnam era but did not serve in a combat theater or an area in which hostilities occurred, so long as they sought counseling before the year 2004.

In proposed paragraph (a)(4) we would implement section 401 of the 2010 Act, which states that “[a]ny member of the Armed Forces, including a member of the National Guard or reserve, who serves on active duty in the Armed Forces in Operation Enduring Freedom or Operation Iraqi Freedom is eligible for readjustment counseling and related mental health services under [38 U.S.C. 1712A].” We would extend eligibility to such active duty servicemembers and offer the same benefits as those provided to veterans under section 1712A. In our view, section 401 of the 2010 Act does not contemplate providing a lesser benefit to eligible active duty servicemembers.

Additionally, after consultation with the Department of Defense, VA considers Operation New Dawn to be part of the same contingency operation that was formerly called Operation Iraqi Freedom. Therefore, VA will consider participants in Operation New Dawn to be eligible for benefits under the legal authorities pertaining to Operation Iraqi Freedom.

Section 304 of the 2010 Act specifically requires VA to provide readjustment counseling to members of the immediate family of a veteran who served in Operation Enduring Freedom or Operation Iraqi Freedom (OEF/OIF) during the 3-year period beginning on the date of the return of such veteran from deployment in Operation Enduring Freedom or Operation Iraqi Freedom to assist in “the readjustment of such veterans to civilian life,” the recovery of such veterans from an injury or illness incurred during deployment, and “the readjustment of the family following the return of such veterans.”

VA’s long-standing interpretation of 38 U.S.C. 1712A has been that marriage and family counseling is a necessary component of counseling provided to a veteran to assist in readjusting to civilian life. The support of a family member and spouse is essential to the veteran’s ability to successfully transition to civilian life. By receiving readjustment counseling, such family member and spouse is better able to cope with the veteran’s readjustment process, and understand how to better assist the veteran, regardless of whether or not the veteran is currently receiving readjustment counseling of his or her own accord. Moreover, in cases where a veteran is provided mental health services as a result of a referral from a Vet Center, VA is specifically authorized to provide mental health services that “include such consultation, counseling, training,

services, and expenses as are described in [38 U.S.C.] 1782 and 1783.” Section 1782, in turn, provides independent authority for VA to provide counseling for the family members of veterans who are receiving VA treatment, and we have recently clarified this authority in 38 CFR 71.50. In addition, members of the veteran’s immediate family qualify for bereavement counseling under section 1783, if the family member was already in receipt of counseling services under section 1782. Unlike section 304 of the 2010 Act, these statutes are not limited to OEF/OIF veterans. Moreover, as further explained below in our definition of the readjustment counseling services that VA currently provides through our Vet Centers, VA is already providing many readjustment counseling services to members of a veteran’s immediate family, without the limitations established in section 304. For these reasons, we do not believe that Congress intended that section 304 should be interpreted to restrict readjustment counseling to members of the immediate family of veterans who served in OEF/OIF. We, therefore, propose to simply state in paragraph (a)(5) that VA will provide readjustment counseling to “[m]embers of the immediate family of a veteran or servicemember who is eligible for readjustment counseling under paragraphs (a)(1), (2), (3) or (4) of this section.” By using a broad statement, we would implement the authority in section 304, while recognizing VA’s continuing duty to provide the full range of readjustment counseling services to other veterans’ family members under the authorities described above and in accordance with long-standing VA practice.

VA is required to determine if a veteran served on active duty in a theater of combat operations under this authority “in consultation with the Secretary of Defense.” See 38 U.S.C. 1712A(a)(1)(B)(i)(I), (a)(2)(A), (a)(2)(B). Proposed paragraph (b)(2)

would list the various types of evidence VA will accept as evidence of service in a theater of combat operations. The list includes every category of medal that can be used to establish eligibility, with parenthetical examples of the most common specific medals within certain categories. However, this list cannot be exhaustive, as additional medals may be added at any time. The list is based on years of practice and cooperation with the Department of Defense (DoD), and all veterans who serve in either a combat theater or an area where hostilities occur, and receive one of the medals listed in proposed paragraph (b) would qualify. We would include a “catch-all” category at the end of the paragraph for “other combat theater awards” established by public law or executive order.” VA will continue to actively consult with DoD on this issue and base eligibility on additional medals where appropriate.

Proposed paragraph (b)(1) would state that veterans may submit an annotated DD-214 indicating service in a designated theater of combat operations.

Proposed paragraph (b)(3) would allow VA to accept receipt of Hostile Fire or Imminent Danger Pay, commonly known as “combat pay,” or combat tax exemption after November 11, 1998, as proof that the veteran or servicemember served on active duty in a theater of combat operations.

Proposed paragraph (b)(4) would also allow VA to independently verify appropriate service in coordination with DoD. Although persons seeking counseling generally submit a DD-214 and other appropriate documentation showing receipt of a medal, VA may act independently when the veteran or servicemember lacks documentation, or when a veteran states that it will be difficult for him or her to obtain such documentation.

Proposed paragraph (c) would implement section 402 of the 2010 Act, which added 38 U.S.C. 1712A(c), which reads as follows:

(c) Upon receipt of a request for counseling under [38 U.S.C. 1712A] from any individual who has been discharged or released from active military, naval, or air service but who is not otherwise eligible for such counseling, the Secretary [of VA] shall—

(1) provide referral services to assist such individual, to the maximum extent practicable, in obtaining mental health care and services from sources outside [VA]; and

(2) if pertinent, advise such individual of such individual's rights to apply to the appropriate military, naval or air service, and to [VA], for review of such individual's discharge or release from such service.

38 U.S.C. 1712A(c).

The benefit authorized by section 1712A, i.e., “counseling to the veteran to assist the veteran in readjusting to civilian life,” and by section 401 of the 2010 Act (“readjustment counseling”) is not defined by statute. In proposed paragraph (d), we would state that “readjustment counseling” includes but is not limited to: psychosocial assessment, individual counseling, group counseling, marital and family counseling for military-related readjustment issues, substance abuse assessments, medical referrals, referral for additional VA benefits, employment assessment and referral, military sexual trauma counseling and referral, and outreach. We would add that a “psychosocial assessment” means the holistic assessing of an individual’s psychological, social, and functional capacities as it relates to their readjustment from a combat theater. We note that VA is authorized to provide these services via Vet Center counselors, and to train such counselors, by 38 U.S.C. 1712A(d).

Proposed paragraph (e) would establish the confidentiality of records maintained under this section. Benefits provided under the proposed rule, in accordance with current practice, would be provided exclusively by VA Vet Centers, which operate independently of any VA medical center or DoD. In accordance with applicable authorities, including 5 U.S.C. 552a, 38 U.S.C. 5701 and 7332, 45 CFR parts 160 and 164, and VA's System of Records 64VA15, "Readjustment Counseling Service Vet Center Program," most recently amended at 74 FR 29019 (June 18, 2009), VA Vet Center records will not be disclosed to any VA medical personnel or to DoD without the express, signed authorization of the veteran or servicemember, or a specific exception permitting their release. We believe that it is important to state this in the proposed rule to allay any fears, particularly fears held by active duty servicemembers, that their records regarding readjustment counseling will be shared with DoD without proper legal authority.

Executive Orders 12866 and 13563

Executive Orders 12866 and 13563 direct agencies to assess the costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, and other advantages; distributive impacts; and equity). Executive Order 13563 (Improving Regulation and Regulatory Review) emphasizes the importance of quantifying both costs and benefits, reducing costs, harmonizing rules, and promoting flexibility. Executive Order 12866 (Regulatory Planning and Review) defines a "significant regulatory action," which requires review

by the Office of Management and Budget (OMB) as “any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) Raise novel legal or policy issues arising out of legal mandates, the President’s priorities, or the principles set forth in this Executive Order.”

The economic, interagency, budgetary, legal, and policy implications of this regulatory action have been examined and it has been determined not to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act of 1995 requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Paperwork Reduction Act

This proposed rule includes a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521) that requires approval by the Office of Management and Budget (OMB). Accordingly, under section 3507(d) of the Act, VA has submitted a copy of this rulemaking to OMB for review. OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Proposed § 17.2000(b) contains a collection of information under the Paperwork Reduction Act (44 U.S.C. 3501-3521). If OMB does not approve the collections of information as requested, VA will immediately remove the provisions containing a collection of information or take such other action as is directed by OMB.

Comments on the collections of information contained in this proposed rule should be submitted to the Office of Management and Budget, Attention: Desk Officer for the Department of Veterans Affairs, Office of Information and Regulatory Affairs, Washington, DC 20503, with copies sent by mail or hand delivery to: the Director, Office of Regulation Policy and Management (02REG), Department of Veterans Affairs, 810 Vermont Ave., NW, Room 1068, Washington, DC 20420; fax to (202) 273-9026; or through www.Regulations.gov. Comments should indicate that they are submitted in response to “RIN 2900-AN92.”

OMB is required to make a decision concerning the collections of information contained in this proposed rule between 30 and 60 days after publication of this document in the Federal Register. Therefore, a comment to OMB is best assured of

having its full effect if OMB receives it within 30 days of publication. This does not affect the deadline for the public to comment on the proposed rule.

VA considers comments by the public on proposed collections of information in—

- Evaluating whether the proposed collections of information are necessary for the proper performance of the functions of VA, including whether the information will have practical utility;

- Evaluating the accuracy of VA's estimate of the burden of the proposed collections of information, including the validity of the methodology and assumptions used;

- Enhancing the quality, usefulness, and clarity of the information to be collected;

and

- Minimizing the burden of the collections of information on those who are to respond, including through the use of appropriate automated, electronic, mechanical, or other technological collection techniques or other forms of information technology, e.g., permitting electronic submission of responses.

The proposed amendments to 38 CFR part 17 contain collections of information under the Paperwork Reduction Act for which we are requesting approval by OMB. These collections of information are described immediately following this paragraph, under their respective titles.

Title: Readjustment counseling.

Summary of collection of information: The proposed rule at § 17.2000(b) would allow a veteran to submit a copy of a DD-214 or other appropriate documentation as evidence that the veteran received a medal that would serve as the basis for

establishing his or her eligibility to receive readjustment counseling.

Description of the need for information and proposed use of information: Receipt of one of the listed medals will be accepted as evidence to establish eligibility for readjustment counseling.

Description of likely respondents: Veterans or active duty service members.

Estimated number of respondents per year: 57,000.

Estimated frequency of responses per year: 1.

Estimated total annual reporting and recordkeeping burden: No more than 1 hour to locate and scan the appropriate documentation into the veteran's Record.

Regulatory Flexibility Act

The Secretary of Veterans Affairs and the Secretary of Defense hereby certify that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601- 612. This proposed rule would not cause a significant economic impact on health care providers, suppliers, or other small entities. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance program number and title for this rule are as follows: 64.005, Grants to States for Construction of State Home Facilities; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009,

Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.024, VA Homeless Providers Grant and Per Diem Program.

List of Subjects in 38 CFR Part 17

Administrative practice and procedure, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs-health, Government programs-veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and dental schools, Medical devices, Medical research, Mental health programs, Nursing home care, Veterans.

Approved: November 15, 2011

John R. Gingrich,
Chief of Staff,
Department of Veterans Affairs.

Approved: February 29, 2012

Jo Ann Rooney,
Acting Under Secretary of Defense,
(Personnel & Readiness),
Department of Defense.

For the reasons set forth in the preamble, 38 CFR part 17 is proposed to be amended as follows:

PART 17 – Medical

1. The authority citation for part 17 continues to read as follows:

AUTHORITY: 38 U.S.C. 501, and as noted in specific sections.

2. Add an undesignated center heading and § 17.2000 to read as follows:

VET CENTERS

§ 17.2000 Vet Center services.

(a) Eligibility for readjustment counseling. Upon request, VA will provide readjustment counseling to the following individuals:

(1) A veteran who served on active duty in a theater of combat operations during a period of war.

(2) A veteran who served on active duty in an area in which hostilities occurred, or in combat against a hostile force during a period of hostilities.

(3) A veteran who served on active duty during the Vietnam era who sought or was provided counseling under 38 U.S.C. 1712A before January 1, 2004.

(4) Any member of the Armed Forces, including a member of the National Guard or reserve, who served on active duty in the Armed Forces in Operation Enduring Freedom or Operation Iraqi Freedom.

(5) Members of the immediate family of a veteran or servicemember who is eligible for readjustment counseling under paragraphs (a)(1), (2), (3) or (4) of this section.

(b) Proof of eligibility. For the purposes of this section, proof of service in a theater of combat operations or in an area during a period of hostilities in that area will be established by:

(1) A DD Form 214 (Certificate of Release or Discharge from Active Service) containing notations of service in a designated theater of combat operations; or

(2) Receipt of one of the following medals: The Armed Forces Expeditionary Medal, Service Specific Expeditionary Medal (e.g., Navy Expeditionary Medal), Combat Era Specific Expeditionary Medal (e.g., the Global War on Terrorism Expeditionary Medal), Campaign Specific Medal (e.g., Vietnam Service Medal or Iraq Campaign Medal), or other combat theater awards established by public law or executive order; or

(3) Proof of receipt of Hostile Fire or Imminent Danger Pay (commonly referred to as “combat pay”) or combat tax exemption after November 11, 1998.

(4) Independent verification by VA in coordination with the Department of Defense.

(c) Referral and advice. Upon request, VA will provide to an individual who has been discharged or released from active military, naval, or air service, but who is not otherwise eligible for such counseling, and meets the eligibility requirements of paragraph (a) of this section, the following:

(1) Referral services to assist such individual, to the maximum extent practicable, in obtaining mental health care and services from sources outside VA; and

(2) If pertinent, advise such individual of such individual's rights to apply to:

(i) The appropriate military, naval or air service for review of such individual's discharge or release from such service; and

(ii) VA for a VA benefits eligibility determination under 38 CFR 3.12.

(d) Readjustment counseling defined. For the purposes of this section, readjustment counseling includes but is not limited to: psychosocial assessment, individual counseling, group counseling, marital and family counseling for military-related readjustment issues, substance abuse assessments, medical referrals, referral for additional VA benefits, employment assessment and referral, military sexual trauma counseling and referral, and outreach. A "psychosocial assessment" under this paragraph means the holistic assessing of an individual's psychological, social, and functional capacities as it relates to their readjustment from combat theaters.

(e) Confidentiality. Benefits under this section are furnished solely by VA Vet Centers, which maintain confidential records independent from any other VA or Department of Defense medical records and which will not disclose such records without either the veteran or servicemember's voluntary, signed authorization, or a specific exception permitting their release. For more information, see 5 U.S.C. 552a, 38 U.S.C. 5701 and 7332, 45 CFR parts 160 and 164, and VA's System of Records 64VA15, "Readjustment Counseling Service Vet Center Program."

(Authority: 38 U.S.C. 501 and 1712A; Pub. L. 111-163, sec. 401)

